

the Commission would have to articulate an "adequate explanation" as to why it will now be "responsible for the private business arrangements that an applicant has made to finance its successful bid,"⁴⁴ irrespective of its past rulings, and why bidders no longer must "make certain of their qualifications and financial capabilities before the auction."⁴⁵ On each of these points, the Commission must "do more than enumerate any factual differences, if any, between [this] and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act."⁴⁶ Anything less surely would suggest "the kind of mindless inconsistency and equivocation that signals arbitrariness."⁴⁷ On the other hand, the Commission may avoid all of this by enforcing its well-founded rules.

Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, 10 FCC Rcd 10724 (Wir. Tel. Bur. 1995) with Public Notice: Reminder to Licensees [sic] with Installment Payment Plans: Availability of Grace Periods, DA 97-580 (Wir. Tel. Bur. Mar. 25, 1997).

^{44.} IVDS Order, 9 FCC Rcd at 6385.

^{45.} Second Report and Order, 9 FCC Rcd at 2382.

^{46.} Adams Telcom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1994) (quoting Melody Music, 345 F.2d at 733).

^{47.} Florida Cellular Mobile Communications Corp. v. FCC, 28 F.3d 191, 197 (D.C. Cir. 1994) (quoting Telocator Network of America v. FCC, 691 F.2d 525, 540 (D.C. Cir. 1982)).

**IV. THE COMMISSION WOULD NOT BE ABLE TO FASHION A PREDICTABLE
WAIVER POLICY IN THIS INSTANCE**

To the extent that certain C block licensees have asked the Commission to waive its competitive bidding installment payment rules in this instance,⁴⁸ the Commission's should deny such a request on the grounds that it will not be able to fashion a predictable waiver policy. It is well-established that the grant of a waiver by the Commission will be upheld only when the Commission articulates a standard by which to determine the policy underlying its waiver,⁴⁹ giving future parties the ability to evaluate the applicability of the policy to their circumstances.⁵⁰ This requirement was enforced in Northeast Cellular, for example, after the Commission waived its requirement that a cellular applicant demonstrate its financial qualifications because the particular applicant was backed in part by a Bell Operating Company. The Court ruled that the Commission could not alter its financial qualification requirements in that way because it provided no basis "to evaluate the applicability or reasonableness of the Commission's

⁴⁸. See, e.g., Gutierrez Letter at 1 n.2; Barker Letter at 3.

⁴⁹. Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166-67 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

⁵⁰. Northeast Cellular, 897 F.2d at 1167.

waiver policy."⁵¹ Such an ill-defined judgment produced nothing more than "a 'we-know-it-when-we-see-it' standard."⁵²

In this case, some parties complain that their efforts to secure financing for their bids after the close of the auction have been unsuccessful. Arguing variously that the operational headstart of A and B block licensees devalued the C block licenses, that the C block eligibility requirements made financing their bids difficult, that system build-out is expensive, and that forthcoming spectrum auctions will add new competitors to the market, other C block licensees conclude that their financial problems are not of their own doing. All of these parties submit that deviation from the Commission's rules under these circumstances will serve the public interest.

To be certain, on this basis alone, the Commission would be hard-pressed to articulate a standard for a waiver in this instance that also could be applied in the future. If based on these arguments, the waiver granted by the Commission would be grounded in the Commission's determination that some bidders should not be held to their payment terms when anticipated private financing does not materialize. Having denied the same relief for IVDS licensees, granting such a waiver for C block licensees would suggest an "unpredictable[] and unworkable policy that is susceptible to discriminatory application,"⁵³ yielding

^{51.} Id. at 1167.

^{52.} Id.

^{53.} Id.

the type of "we-know-it-when-we-see-it" standard struck down in Northeast Cellular. That is hardly the basis for a predictable waiver policy.

V. THE COMMISSION SHOULD CANCEL AND REAUCTION ANY DEFAULTED LICENSES

The Commission's installment payment rules are quite clear: "Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to part 1, subpart O."⁵⁴ And, as Chairman Hundt reported during the C block auction, "We have long had plans to re-auction defaulted licenses right away."⁵⁵ The Joint Commenters urge the Commission to adhere to this policy in the case of broadband PCS C block licenses.

Some parties have argued that the Commission will lose more money if it reauctions the defaulted C block licenses than if it relaxes the payment rules for licensees who cannot satisfy their installment payment obligations. Now, they have argued, the net bids for the subject C block licenses will be lower than the net bids that won the day in the initial auction. Under the Commission's rules, however, this may not be the case.

⁵⁴. 47 C.F.R. § 1.2110(e)(4)(iii).

⁵⁵. Reed E. Hundt, To Loop or Not To Loop: Is That the Question?, Speech to the Cellular Telecommunications Industry Association 3 (Mar. 26, 1996) (emphasis added).

Chairman Hundt announced during the C block auction that "if the reaucted licenses fetch less than the original amounts, we'll go after the original winner for the difference, plus a penalty."⁵⁶ Indeed, Section 1.2104(g)(2) of the Commission's Rules provides:

If a high bidder defaults or is disqualified after the close of an auction, the defaulting bidder will be subject to the penalty in paragraph (g)(1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount.⁵⁷

Paragraph (g)(1) of that section provides that the bidder "will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission."⁵⁸ Thus, defaulting licensees are responsible for ensuring that the government does not lose money in the event of a reauction.

In the case of BDPCS, for example, the Wireless Bureau ordered that the defaulter was responsible for the \$42.7 million difference between its C block auction net bids and the net bids in the reauction of the same licenses, plus \$24.9 million in penalties.⁵⁹ And, in the case of National Telecom PCS, Inc., the

^{56.} Id.

^{57.} 47 C.F.R. § 1.2104(g)(2).

^{58.} Id., § 1.2104(g)(1).

^{59.} BDPCS, Inc., Order, 11 FCC Rcd 14399, 14402 (Wir. Tel. Bur. 1996), recon. denied, BDPCS, Inc., Order, DA 97-1066 (Wir. Tel. Bur. May 21, 1997).

Wireless Bureau charged the \$240,000 bid difference and \$5,000 in penalties to the defaulted bidder.⁶⁰ Any argument by current C block licensees that the net proceeds from a reauction will be less than the initial bids ignores the Commission's rules regarding default payment obligations and the Wireless Bureau's established practice of pursuing the defaulters themselves. If these same licensees respond that they do not have the money to satisfy the default payment obligations, the Commission should not favor them with further installment payment relief.

Moreover, it should not be overlooked that the Commission might receive the same or better present value in the aggregate if it cancels and reauctions defaulted C block licenses. The Commission already holds 10 percent of the current winning bids for these C block licenses as a result of downpayments. When added to reauction bids funded by new sources of capital, these downpayments could yield aggregate prices well in excess of the A and B auction results. The Commission will achieve the same result identified in many of the requests for relief without compromising its rules and without establishing an unworkable competitive bidding payment precedent.

Still other parties have argued that rescuing certain C block licensees from their own business decisions now will help them to provide service to the public more quickly. These parties typically add that permitting them to retain their

⁶⁰. National Telecom PCS, Inc., Order, 11 FCC Rcd 14605, 14609 (Wir. Tel. Bur. 1996), aff'd, National Telecom PCS, Inc., Memorandum Opinion and Order, FCC 97-192 (rel. June 19, 1997).

licenses will mean faster roll-out of service than if the Commission reauctions the same licenses. In response to the same argument, however, the Commission ruled just last week that:

While the Commission generally favors such rapid deployment, this goal must be balanced against the integrity of the auction process. If the auction process is compromised, delays in service are more likely to occur. Thus, the integrity of the auction process depends on both rapid service deployment and the timely meeting of payment obligations.⁶¹

Similarly, in the IVDS context, the Wireless Bureau wrote:

In regard to [the] assertion that permitting an extension of time within which to make a down payment will provide service more quickly than re-auctioning an IVDS license, while this may be true in an individual case, the overall effect of permitting late payments will be a delay in service to the public-at-large.⁶²

As the Commission established in its competitive bidding Second Report and Order:

We believe that, as a general rule, when an auction winner defaults on its final payment or its otherwise disqualified after having made the required down payment, the best course of auction would be to re-auction the license. Although this may cause a brief delay in the initiation of service to the public, the passage of time between the original auction and the disqualification may have seen circumstances change so significantly as to alter the value of the license and the identity of the high bidder. One of our primary concerns is that licenses be awarded to the parties that value them most highly, and in this situation this can best be assured through a re-auction.⁶³

^{61.} National Telecom PCS, Inc., Memorandum Opinion and Order, FCC 97-192, ¶ 16 (rel. June 19, 1997) (footnote omitted) (emphasis added).

^{62.} IVDS MO&O, 11 FCC Rcd at 5243 (footnote omitted).

^{63.} Second Report and Order, 9 FCC Rcd at 2383 (emphasis added).

Indeed, the Commission should consider the extent to which the same parties that are promising the rapid development of service to the public have fulfilled their Commission obligations to date. The Commission did not hesitate to reacquire the defaulted licenses of BDPCS and National Telecom PCS in 1996, prompting the Wireless Bureau to note recently that it has "succeeded in rapidly reacquiring defaulted C block licenses."⁶⁴ There is no reason for the Commission to pursue a different course here.

Finally, some C block licensees have asked the Commission simply to write down their auction debt — that is, their bid amounts — but to permit them to retain the licenses won with those bids. Under federal law, however, the Commission is authorized only to "compromise a claim of the Government of not more than \$100,000"⁶⁵ and it may do that only after undertaking to collect the government obligation.⁶⁶ Plainly, were the Commission simply to write off the bid amounts of certain C block licensees beyond \$100,000, it would be acting "in excess of statutory jurisdiction, authority, or limitations,"⁶⁷ which a reviewing court would be required to hold unlawful.⁶⁸

⁶⁴. Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, Order, DA 97-891, ¶ 10 n.21 (Wir. Tel. Bur. Apr. 28, 1997).

⁶⁵. 31 U.S.C. § 3711(a)(2).

⁶⁶. Id., § 3711(a)(1).

⁶⁷. 5 U.S.C. § 706(2)(C).

⁶⁸. Id., § 706(2).

In the end, faced with a choice between adhering to its established auction rules and rendering its auction payment obligations negotiable, the Commission should not hesitate to demonstrate that its auction rules are predictable and firm. As the United States Court of Appeals for the D.C. Circuit wrote:

it is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.⁶⁹

It cannot be doubted that "orderliness and predictability" are central to the success of the Commission's system of competitive bidding. On that basis alone, the Commission should utilize this opportunity to confirm that bidders — now and in the future — must "make certain of their qualifications and financial capabilities before the auction."⁷⁰ At bottom, no bidder should be permitted to "avoid the financial obligations they willingly undertook when they applied to participate in the auction."⁷¹

^{69.} Reuters, Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citation omitted).

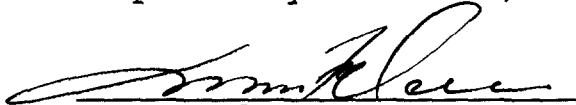
^{70.} Second Report and Order, 9 FCC Rcd at 2382.

^{71.} IVDS Order, 9 FCC Rcd at 6385.

VI. CONCLUSION

For these reasons, the Joint Commenters urge the Commission to lift the current suspension of broadband PCS installment payment deadlines, to deny all pending requests for anticipatory installment payment relief, to grant requests for grace period relief only where a licensee makes a clear and public showing of a commercially reasonable business plan to make its payments, and to reauction defaulted licenses to responsible parties without delay.

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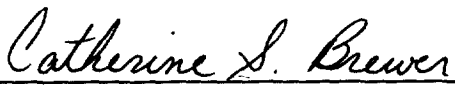
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